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No. 04-1332

IN THE

Supreme Court of the United States

RICHARD WILL, *et al.*,

Petitioners,

v.

SUSAN HALLOCK, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

The judgment bar provision of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2676, provides: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

This case presents two questions:

1. Whether a court of appeals has jurisdiction over the interlocutory appeal of a district court's order denying a motion to dismiss based on the FTCA's judgment bar provision.

2. Whether section 2676 bars a subsequent case against government employees based on the same facts as a prior case, where the first case was styled as an action "under section 1346(b)" but was dismissed for lack of subject matter jurisdiction on the ground that section 1346(b) did not apply to the claim alleged.

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INTRODUCTION

Richard Hallock was the victim of identity theft. Unknown to him, his credit card information was used to pay the subscription fee for a website that displayed child pornography. Agents of the United States Customs Service, investigating the website, traced the payment to Mr. Hallock's credit card, obtained a warrant to search his residence, and seized all of the computer equipment at the home. Much of that equipment was the property of respondent Ferncliff Associates, a computer software business owned by respondent Susan Hallock, Richard Hallock's wife. When the computers were returned to the Hallocks six months later, the hard drives of several had been destroyed beyond repair. As a result, Ferncliff Associates was forced to go out of business. Eventually, a computer expert hired by the Hallocks concluded that the computer damage was intentional. In this case, alleging a *Bivens* claim for intentional violations of their constitutional rights, Susan Hallock and Ferncliff Associates are seeking compensation from the individual agents responsible for the destruction of their property and resulting demise of their business.

STATEMENT OF THE CASE

The Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA") "marks the culmination of a long effort to mitigate the unjust effects of sovereign immunity from suit." *Feres v. United States*, 340 U.S. 135, 139 (1950). Enacted in 1946, the FTCA gives federal courts jurisdiction over damages suits against the United States for torts committed by federal employees in the scope of their employment. 28 U.S.C. § 1346(b). The waiver of sovereign immunity is subject to exceptions for claims arising in 14 specific areas, set forth in section 2680. For example, and most relevant to this case, the waiver does "not apply" to claims arising from the detention of goods. *Id.* § 2680(c).

Before bringing suit under the FTCA, a claimant must file an administrative claim with the agency for which the employee worked at the time of the tortious act. *Id.* § 2672. The claim must be filed within two years of the conduct at issue, and any lawsuit must be filed within six months of the agency's denial of the claim. *Id.* § 2401(b). The claimant's acceptance of an award or settlement during the administrative process constitutes a complete release of any claim based on the same act or omission against the United States and the employee involved. *Id.* § 2672.

The FTCA further provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Id. § 2676. As discussed in more detail below, *see infra* pp. 12-16, this provision, known as the FTCA's "judgment bar," was intended to extend to the employee the res judicata effect of a judgment in an FTCA case.

In 1988, this Court held that federal employees were not immune from state-law tort liability for conduct covered by the FTCA. *See Westfall v. Erwin*, 484 U.S. 292, 297-98 (1988). Congress reacted by passing the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564 (1988), commonly referred to as the Westfall Act. The Westfall Act added to the FTCA an "exclusive remedy" provision, 28 U.S.C. § 2679(b)(1), which precludes suit against federal employees for most tortious conduct committed within the scope of their employment. The exclusive remedy provision does not apply either to actions for constitutional violations brought under *Bivens v. Six Unknown*

Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), or to actions for violations of federal statutes that authorize suit against individual employees. 28 U.S.C. § 2679(b)(2).

Under the Westfall Act, if a claimant files a state-law tort suit against a federal employee and the Government certifies that the employee was acting within the scope of his employment at the time of the incident at issue, the Government will be substituted in as the defendant. *Id.* § 2679(d)(1). If the claimant has not previously filed an administrative claim, the case will be dismissed without prejudice to allow the claimant an opportunity to exhaust the administrative remedy. *Id.* § 2679(d)(5).

Factual Background

Ferncliff Associates was a computer software business owned by Susan Hallock, through which her husband Richard Hallock developed and sold software programs. In early 2000, Mr. Hallock's credit card number was used, without his knowledge and by someone unknown to him, to pay the subscription fee for an Internet website. That website was used to display child pornography, in violation of 18 U.S.C. §§ 2252 and 2252A. JA 30-31. United States Customs Service agents became aware of the website and commenced an investigation, which led them to Mr. Hallock's credit card and so to Mr. Hallock. In June 2000, the Customs Service obtained a search warrant for the Hallock residence. *Id.*

Pursuant to the search warrant, armed federal law enforcement officers entered the home of Richard and Susan Hallock and seized all the computer equipment and personal and business records in the house. Because the Hallock residence also served as the office of Ferncliff Associates, when the computers and other records were seized, so were software design files, intellectual property including computer source

code (*i.e.*, software programming codes), client files, and other proprietary material necessary to the functioning of Ferncliff Associates. *Id.* The agents seized both the primary files and the backups. *Id.* at 31. Without that material and, in particular, the computer source code, the business could not operate.

The Customs Service kept the computer equipment for several months. During that time, it made a copy of each of the internal and removable hard drives. *Id.* at 32. It later examined the data on the hard drives to determine whether the computers had been used in connection with the child pornography website and found no evidence of such use. Pet. App. 4a. Eventually, the investigation was closed, and no charges were brought against Mr. Hallock. JA 31.

On September 11 and September 15, 2000, an Assistant United States Attorney offered to return the computers if Mr. Hallock would sign an agreement prepared by her office. *Id.* at 32. Mr. Hallock objected to language in the agreement, including language releasing the Government and its employees from any damage caused to the property while it was in custody and language agreeing that the Government had made accurate copies of the information in the computers (copies that Mr. and Mrs. Hallock were not permitted to see). *See* 2d Cir. App. A-21 to A-26. The agents therefore did not return the computers. Eventually, in December 2000, Customs Service agents returned all the seized property, without requiring either Richard or Susan Hallock to sign any agreement. JA 32. Within hours, Richard Hallock discovered that four of the nine seized computers had been irreparably damaged and that five hard drives had been damaged to such an extent that the files, records, and computer source code on those drives had been completely eradicated. *Id.* at 33.

Although the United States Attorney's office confirmed the existence of copies of the hard drives several times between

September 2001 and April 2005, Richard and Susan Hallock's repeated requests for a copy of the copies of their own hard drives were rejected by both the Customs Service agents and the United States Attorney's office. The loss of the computer data and source codes was fatal to Ferncliff Associates, which was forced to close. JA 33.

Procedural Background

In October 2001, Susan Hallock and Ferncliff Associates (collectively, "Hallock") filed an administrative claim under the Federal Tort Claims Act, 28 U.S.C. § 2672, seeking compensation for the loss of their hard drives, including the loss of their intellectual property and resulting loss of business. They received no response to the administrative claim. In July 2002, they sued the United States, alleging various torts and citing the FTCA's jurisdictional provision, 28 U.S.C. § 1346(b). In October 2002, they filed an amended complaint.

Shortly thereafter, the United States moved to dismiss for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted on the grounds that each of the claims was barred by one of two exceptions to section 1346: sections 2680(c) and 2680(h). Section 2680(c) provides that section 1346(b) "shall not apply to" any claim "arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law-enforcement officer," and section 2680(h) provides that section 1346(b) "shall not apply to" any claim arising out of interference with contract rights, among other things.

Hallock sought leave to amend the complaint to add the individual government employees as defendants and to state a *Bivens* claim. That request was denied without prejudice. NDNY No. 02-942, Dkt. #17 (Dec. 23, 2002). On March 21, 2003, the district court granted the motion to dismiss. The

court found that all of the claims arose from the detention of goods and, therefore, fell within the scope of section 2680(c). Pet. App. 38a-39a. Because the United States has not waived sovereign immunity with respect to such claims, the court held that it lacked subject matter jurisdiction and dismissed the case. *Id.*

Meanwhile, on February 13, 2003, Hallock filed this *Bivens* action against the individual employees involved in the seizure, detention, and destruction of the property (Petitioners here). JA 6. The case was filed in the same court and assigned to the same judge. Pet. App. 18a, 27a. In support of the *Bivens* claim, Hallock later submitted an affidavit and report of a computer expert who had performed a forensic analysis of the hard drives and concluded that they had been intentionally damaged. *See* 2d Cir. App. A-35 to A-36, A-42.

Petitioners moved to dismiss based on the FTCA's judgment bar, 28 U.S.C. § 2676. JA 10; *see supra* p. 2. The district court denied the motion. JA 37. The court held that the judgment bar does not apply when the prior FTCA claim has been dismissed for lack of subject matter jurisdiction. The court reasoned that the concerns behind the judgment bar did not apply in such circumstances. Pet. App. 24a.

The Second Circuit affirmed. The court of appeals first considered whether it had jurisdiction over the defendants' interlocutory appeal. Analogizing the district court's order to an order denying qualified immunity, the court held that the order was a collateral order appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Pet. App. 9a-11a.

Turning to the applicability of the judgment bar, the court of appeals focused on the language of section 2676, which states that the bar is triggered by a "judgment in an action under section 1346(b)" of the FTCA. The court held that

where an action is brought that does not fit within the category of cases to which section 1346(b) applies, the judgment bar is not triggered. Because "a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event," such a judgment is not in "an action under section 1346(b)" for purposes of the judgment bar. Pet. App. 14a.

SUMMARY OF ARGUMENT

1. The FTCA's judgment bar, 28 U.S.C. § 2676, extends the res judicata effect of a judgment in an FTCA action to the federal employee whose act formed the basis for the FTCA claim. The statutory language mimics the language of res judicata, which is also a "judgment bar." Furthermore, the purpose of section 2676, its legislative history, and legal commentary soon after its passage all reflect the understanding that the FTCA's judgment bar is a res judicata provision. This understanding is central to resolving both questions presented.

2. The district court's denial of Petitioners' motion to dismiss based on the judgment bar did not satisfy the stringent requirements of the collateral order doctrine. This Court has expressly rejected the notion that orders denying res judicata defenses are immediately appealable. Although Petitioners characterize the judgment bar as an "immunity" and a "right not to stand trial," it is neither. Indeed, both Congress and this Court have identified a separate FTCA provision, section 2679(b), as providing an "immunity" from tort suits for federal employees for conduct within the scope of their employment. Neither has used that term to describe section 2676. Rather, section 2676 is a res judicata defense, which bars a subsequent action when a prior action has been litigated to a judgment on the merits.

Almost every defense that could form the basis for pretrial dismissal might conceivably be described as a "right

not to stand trial." However, as the Court has repeatedly stated, only a few of those defenses cannot be effectively reviewed following final judgment. Petitioners' section 2676 defense is not one of those few.

3.a. "Judgment" does not have a uniform meaning. Accordingly, in construing the meaning of the term as it appears in section 2676, it is necessary to consider the context of the provision, and the structure and purposes of the FTCA in general and section 2676 in particular. In section 2676, the word "judgment" is best construed to mean "judgment on the merits of the tort claim." This reading is consistent with the other uses of "judgment" in the FTCA and with the res judicata principles at the heart of section 2676. This reading also avoids the scenarios in which Petitioners' interpretation would force a dismissal of a case in circumstances that would undermine the FTCA's objectives. Because the judgment in Hallock's prior case was unrelated to the merits of the underlying tort claims, the judgment bar does not preclude this action.

b. The conclusion that the judgment bar does not apply here also follows from the statutory language providing that the bar comes into play only where the plaintiff has previously obtained a judgment "in an action under 1346(b)." In Hallock's prior case, the judgment was based on a finding that the claims arose from the detention of goods and thus that they were excepted by section 2680(c) from the jurisdictional grant of section 1346(b). That is, the case was dismissed because, pursuant to section 2680, section 1346(b) did "not apply." An action cannot be at once "under section 1346(b)" and one to which "section 1346(b) shall not apply." Therefore, as the Second Circuit held, the judgment in the prior case did not trigger the judgment bar. Neither *FDIC v. Meyer*, 410 U.S. 471 (1994), nor *United States v. Smith*, 499 U.S. 160 (1990), each of which addressed provisions other than section 2676 and

focused on the context and purposes of those other provisions, is inconsistent with the Second Circuit's holding.

ARGUMENT

The language, purpose, and legislative history of the FTCA's judgment bar, 28 U.S.C. § 2676, all show that the judgment bar was intended to extend the traditional principles of res judicata to cover the government employees whose conduct underlies an FTCA claim. An understanding of the res judicata foundation of the judgment bar resolves both questions presented in favor of Hallock.

I. The Judgment Bar Extends To Government Employees The Res Judicata Effect Of A Judgment In An FTCA Case.

A. Res Judicata Principles

Under traditional principles of res judicata, or claim preclusion, "a final judgment on the merits of an action precludes parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Thus, after a plaintiff loses a case, his "entire claim is barred by the judgment, even as to evidence theories, arguments, and remedies that were not advanced in the first litigation." 18 Wright, Miller & Cooper, *Federal Practice & Procedure* § 4406, at 141 (2d ed. 2002).[1]

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[1]The related doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second case an issue that was litigated, decided, and necessary to the judgment

(continued...)

Historically, federal law applied res judicata principles to subsequent litigation of the same claim only when the parties to the second action were either the parties or in privity with the parties to the first action. This limitation was known as mutuality. "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979). Although this requirement has eroded over time, *see id.* at 326-28, at the time the FTCA was enacted, the federal courts required mutuality. *See United States v. Pink*, 315 U.S. 203, 216 (1942); *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912); *see also Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 326 (1971) ("As late as 1961, eminent authority stated that '[m]ost state courts recognize and apply the doctrine of mutuality, subject to certain exceptions . . . . And the same is true of federal courts, when free to apply their own doctrine.'") (alterations in original; citation omitted); Restatement (First) of Judgments § 93 (1942) (non-party or privy to prior action "not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action").

The mutuality requirement, however, was long subject to exceptions, even before it fell into disfavor. One "well defined" exception applied where liability in either the first or the second case was based on respondeat superior. *Lober v. Moore*, 417 F.2d 714, 717-18 (D.C. Cir. 1969). In those circumstances, the resolution of the claim in the first case as against the employer would be res judicata in a second case against the employee, and vice versa. *Id.* at 717-18 & nn.28-30 (stating rule and citing cases). Prior to enactment of the FTCA,

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[1](...continued)
in a prior case. *Allen*, 449 U.S. at 94.

however, the federal Government was immune from liability for the tortious acts of its employees in the scope of their employment. Therefore, the application of res judicata in "respondeat superior" situations involving the Government had not been addressed.[2]

Although res judicata generally bars litigation of claims that were brought, or could have been brought, in a prior case, the doctrine does not apply when the first case was dismissed for lack of subject matter jurisdiction. *Schlesinger v. Councilman*, 420 U.S. 738, 747 (1975) (where court lacks subject matter jurisdiction, judgment in case has no res judicata effect); *Jarrard v. CDI Telecomm., Inc.*, 408 F.3d 905, 916 (7th Cir. 2005) ("The Board's dismissal on the basis of jurisdiction certainly did not amount to a full and final adjudication on the merits of Jarrard's tort claims, so res judicata, or claim

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[2]Before 1946, the Government could be sued in tort in certain limited circumstances defined by statutes such as the Public Vessels Act, 46 U.S.C. App. § 781 (1925), and the Suits in Admiralty Act, 46 U.S.C. App. § 741 (1920), which allowed suit against the Government for certain maritime torts. However, whether a ruling in a case brought against the Government under such a statute would preclude a claim against the employee involved had not been addressed in cases under those acts. *But compare United States v. Nunnally*, 316 U.S. 258 (1942) (judgment in suit against collector of Internal Revenue to recover overpayment of taxes is not res judicata with respect to subsequent action against United States to recover same overpayment), *with Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (judgment against government officer that is binding on United States is res judicata as to a second suit by same plaintiff raising same issue against another government officer).

preclusion, clearly does not apply here."); 18A Wright, Miller & Cooper, *supra*, § 4436, at 150 (describing "well settled" rule). In those circumstances, the preclusive effect of the judgment of dismissal extends only to the issue of subject matter jurisdiction, but not to other matters that were or could have been raised in the case. *Park Lake Res. Ltd. Co. v. Department of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004); Restatement (Second) of Judgments § 12 cmt. c (1982). In other words, the decision in the first case will be given collateral estoppel effect but not res judicata effect.

This understanding of the preclusive effect of a dismissal based on lack of subject matter jurisdiction underlies the Court's repeated statements that res judicata applies where a prior case was decided "on the merits," *see, e.g.*, *Allen*, 449 U.S. at 94; *Montana v. United States*, 440 U.S. 147, 153 (1979), and is consistent with the purpose of the res judicata doctrine: "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153; *see Allen*, 449 U.S. at 94 (res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication").

B. Res Judicata And The FTCA's Judgment Bar

Res judicata is primarily a creation of the common law, but various federal statutes invoke res judicata principles. 18 Wright, Miller & Cooper, *supra*, § 4403, at 35 & n.23. The FTCA is one such statute. *Id.* at 35 n.23. Again, section 2676 provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee

> of the government whose act or omission gave rise to the claim.

The language of section 2676—"judgment" and "bar"—is classic res judicata terminology. *See, e.g., Parklane Hosiery Co.*, 439 U.S. at 326 n.5 ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."); *United States v. Moser*, 266 U.S. 236, 241 (1924) (where res judicata applies, "judgment upon the merits constitutes an absolute bar" to subsequent action); Restatement (First) of Judgments, *supra*, Ch. 3, Introductory Note ("When it is stated that 'the rules of res judicata are applicable,' it is meant that the rules as to the effect of a judgment as a merger or as a bar . . . are applicable."); *id.* § 48 (section entitled "Judgment for Defendant On The Merits—Bar"); 18 Wright, Miller & Cooper, *supra*, § 4402, at 7 (discussing "Terminology of Res Judicata").

The purpose and legislative history of the FTCA also demonstrate that section 2676 was intended to extend the res judicata effect of a judgment on the merits in an FTCA case to federal employees. The FTCA was enacted "primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 2747 (2004) (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)); *see* Hearings Before the House Committee on the Judiciary, 77th Cong., 2d Sess. 30 (Jan. 29, 1942) (hereinafter "Hearings") (FTCA "will place the United States, in respect of torts committed by its agents, upon the same footing as a private corporate employer, with certain limitations required for the protection of important governmental functions"). In one of its few references to the judgment bar, the legislative history states: "Judgment in a tort

action constitutes a bar to further action upon the same claim, *not only against the Government* (as would have been true under [the prior version of the bill] H.R. 5373) but also against the delinquent employee . . . ." Hearings, *supra*, at 27 (emphasis added). The prior version of the bill, like the later version, did not expressly address a "bar" on "further action . . . against the Government," *see id.* at 2-3, 58, 60 (H.R. 5373). Thus, the reference in the legislative history to a "bar to further action upon the same claim . . . against the Government" under H.R. 5373 must mean the ordinary res judicata effect that would result from a judgment in an FTCA action.[3]

As discussed above, non-mutual res judicata was generally disfavored in 1946, and the application of non-mutual res judicata in a tort case against a federal employee where the Government was the defendant in a prior suit based on the same negligent conduct had not been addressed by the courts. *See supra* pp. 10-11 & n.2. Consequently, when Congress enacted the FTCA, a judgment on the merits in favor of the United States in an FTCA suit would not clearly have barred a subsequent suit by the same plaintiff against the government employee whose conduct gave rise to the claim. Absent a judgment bar, the employee might have been sued in tort if the plaintiff did not prevail against the United States. Moreover, absent the judgment bar, if the plaintiff won the FTCA suit, he

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[3]The 79th Congress, which passed the FTCA, held no hearings on the bill. This Court therefore has relied on the hearings of the 77th Congress. *Dalehite v. United States*, 346 U.S. 15, 26-27 (1953). The bulk of the hearing report consists of the testimony of an Assistant Attorney General, who explained the Attorney General's proposed amendments to H.R. 5373, one of which was the addition of the judgment bar. Hearings, *supra*, at 1, 3.

then might have filed a second suit against the employee seeking, for example, punitive damages, which are not available against the Government. *See* 28 U.S.C. § 2674.

Permitting a second suit in either of these situations would have defeated one of the central purposes of the FTCA. *See Lauterbach v. United States*, 95 F. Supp. 479 (W.D. Wash. 1951) ("object of surrender of immunity" in FTCA was "to relieve employees of liability in cases in which the doctrine of respondeat superior would apply if the United States were a private corporation"); *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("Generally, [FTCA] cases unfold much as cases do against employers who concede *respondeat superior* liability."). To prevent a claimant from litigating his state-law tort suit a second time, Congress enacted the judgment bar, which releases the employee from tort liability upon resolution of the underlying tort claim, for "[i]t is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone." Hearings, *supra*, at 26, 27.[4]

Not surprisingly, in light of the purposes of the FTCA, legal commentary soon after passage of the Act construed the

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[4]The language quoted in the text above appears in a discussion of section 2672, which provides that an administrative award to the claimant constitutes "a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." The legislative history of the judgment bar explains that the provision was drafted "for reasons already discussed in respect of administrative adjustments of claims." Hearings, *supra*, at 27. The quoted language is the entirety of the "reasons already discussed" in this portion of the hearing report.

judgment bar in accordance with res judicata principles. One early commentator noted that the bar "applies only to judgments rendered on the merits" and cautioned that it "should not be interpreted as referring to any judgment by which the court denied its jurisdiction." Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947). This conclusion was based on the understanding that the judgment bar was a res judicata provision and that a judgment based on lack of jurisdiction "cannot be res judicata of the issues involved in the action." *Id.* 559 & n.170; *accord* Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949) (FTCA extends common law rules of res judicata to non-party employees).[5]

II. The Court of Appeals Did Not Have Jurisdiction Over The Interlocutory Appeal Of The District Court's Order Denying A Motion To Dismiss Based On The FTCA's Judgment Bar.

A. The Collateral Order Doctrine Is Narrowly Construed To Uphold Section 1291's Policy Against Piecemeal Appeals.

Congress has strictly limited appeals as of right within the federal courts to appeals from "final decisions of the district

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[5]Two of the court of appeals decisions on which Petitioners heavily rely also recognize that section 2676 reflects res judicata principles, although they fail to apply those principles in construing the provision. *See Farmer v. Perrill*, 275 F.3d 958, 960 (10th Cir. 2001) (reversing district court decision "under the Section 2676 equivalent of claim preclusion"); *Gasho v. United States*, 39 F.3d 1420, 1438 n.17 (9th Cir. 1994) (suggesting section 2676 applies to judgment "on the merits" and analogizing to res judicata).

court." 28 U.S.C. § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted); *see also Cunningham v. Hamilton County*, 527 U.S. 198, 203 (1999) (section 1291 "descends from the Judiciary Act of 1789, where the First Congress established the principle that only final judgments and decrees of the federal district courts may be reviewed on appeal") (citation and internal quotation marks omitted). A decision is ordinarily considered final and appealable under section 1291 only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

The final judgment rule serves several salutary purposes. By consolidating in one appeal all of the grounds for challenging a trial court's judgment, the rule avoids delay, promotes efficient judicial administration, and reduces the ability of litigants to harass opponents by engaging in a succession of time-consuming and costly appeals. And because many cases settle or are resolved on other grounds in favor of the potential appellant, the rule avoids many appeals entirely. It also gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free from repeated second-guessing by the courts of appeals during the pendency of a case. *See Cunningham*, 527 U.S. at 203-04; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). For these reasons, "the policy of Congress embodied in [section 1291] is inimical to piecemeal appellate review of trial court decisions." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

Nonetheless, section 1291 has been interpreted by the Court to authorize appeals in a "small category" of trial court orders that do not end the litigation. *Swint v. Chambers County*

Comm'n, 514 U.S. 35, 42 (1995). Under the collateral order doctrine first articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), that small category "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42 (citing *Cohen*, 337 U.S. at 546).[6]

In light of the language of section 1291 and the historic policy against piecemeal appellate review, this Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital*, 511 U.S. at 868. Thus, "the conditions for collateral order appeal [are] stringent," and "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Id.* (citation omitted and internal quotation marks omitted). The Court has singled out the denial of a motion to dismiss based on res judicata as an example of an order for which interlocutory review is not appropriate. *Id.* at 873.

Moreover, in the 1990 and 1992 amendments to the Rules Enabling Act, 28 U.S.C. § 2071, Congress "empowered this Court to clarify when a decision qualifies as 'final' for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis." *Swint*, 514 U.S. at 48

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[6]The collateral order doctrine has no basis in the text of section 1291, *see Sell v. United States*, 539 U.S. 166, 189 n.4 (2003) (Scalia, J., dissenting), but the Court has described the doctrine as a "practical construction" of section 1291. *Digital*, 511 U.S. at 867.

(discussing 28 U.S.C. §§ 2072(c) & 1292(e)). Significantly, however, "[t]he procedure Congress ordered for such changes . . . is not expansion by court decision, but by rulemaking under § 2072." *Id.* The Court has since recognized that "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Cunningham*, 527 U.S. at 210 (quoting *Swint*, 514 U.S. at 48).

B. The FTCA's Judgment Bar Does Not Confer An Immunity Or A Right Not To Stand Trial.

Here, as in many cases in which litigants attempt to invoke the collateral order doctrine, the central issue is whether the third prong of the *Cohen* test has been met—that is, whether the decision would be "effectively unreviewable" after final judgment. If this condition is not satisfied, immediate appeal under section 1291 is foreclosed. *Digital*, 511 U.S. at 869. As this Court has explained, the third prong is satisfied only when strict observance of the final judgment rule "would render impossible any review whatsoever," *United States v. Ryan*, 402 U.S. 530, 533 (1971), or "would practically defeat the right to any review at all." *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (citation omitted).

Petitioners' invocation of the collateral order doctrine is based on their theory that the FTCA's judgment bar is analogous to well-established immunities, such as Eleventh Amendment immunity, Speech or Debate Clause immunity, or qualified immunity, which confer a right not to stand trial. The better analogy, however, is to statute of limitations defenses, defenses based on denial of the Sixth Amendment right to a speedy trial, defenses based on releases in agreements between the parties, and, most relevant here, defenses based on res

judicata. Trial court orders addressing these defenses are not immediately appealable, *Digital*, 511 U.S. at 873, and the Court's jurisprudence on the collateral order doctrine calls for the same result with respect to a defense based on section 2676.

As discussed above, *supra* pp. 13-16, the FTCA's judgment bar codifies and extends res judicata principles. Like res judicata doctrine, and unlike immunities, the judgment bar prohibits an action only when a prior suit has already been litigated to judgment and does not generally protect federal officials against actions (such as *Bivens* actions) for which the FTCA is not the exclusive remedy. *See Henderson v. Bluemink*, 511 F.2d 399, 404 (D.C. Cir. 1974) (section 2676 "proscribes a double recovery, not a suit against the individual employee in the first instance").

The res judicata foundation of section 2676 is dispositive here, for *Digital* expressly identified "claims . . . that an action is barred on claim preclusion principles" as among the sort—such as claims that a statute of limitations has run or that the complaint fails to state a claim as a matter of law—that could broadly be characterized as involving a "right not to stand trial," but which does not satisfy the third prong of the *Cohen* test. 511 U.S. at 873. If orders denying res judicata defenses were deemed collateral orders, "it would be no consolation that a party's meritless . . . res judicata claim was rejected on immediate appeal; the damage to the efficient and congressionally mandated allocation of judicial responsibility would be done, and any improper purpose the appellant might have had in saddling its opponent with cost and delay would be accomplished." *Id.*; *see also Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Comm'n*, 273 F.3d 337, 345 (3d Cir. 2001) ("An examination of the doctrine of res judicata or claim preclusion reveals that it is better understood as a defense against liability, not an absolute guarantee against having to face a suit. Claim preclusion entitles a party to rely on prior

judicial decisions and not to be held liable on claims on which that party previously has prevailed.").

"[L]imiting the focus to whether the interest asserted may be called a 'right not to stand trial' [does not] offer much protection against the urge to push the § 1291 limits" because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital*, 511 U.S. at 873. Yet few such rights satisfy the "stringent" conditions for collateral order appeal. *Id.* at 868. To the contrary, the Court has been "emphatic in recognizing that the jurisdiction of the courts of appeals should not, and cannot, depend on a party's agility in [] characterizing the right asserted" as one that "would be 'irretrievably lost' if review were confined to final judgments only." *Id.* at 871-72 (citation omitted). The "core point" is that "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Swint*, 514 U.S. at 43 (quoting *Digital*, 511 U.S. at 873).[7]

For example, like section 2676, statutes of limitations are often framed in terms of a "bar" to an action upon the

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[7]Petitioners correctly note (at 18 n.1) that the district court's denial of their request for certification of the court's order for immediate interlocutory appeal under 28 U.S.C. § 1292(b) is irrelevant to the question whether the particular order at issue is appealable as of right under 28 U.S.C. § 1291. The existence of section 1292(b), however, is relevant more generally in any case concerning the breadth of section 1291 because it—and not the collateral order doctrine—provides a "safety valve" for appeal of interlocutory orders involving "controlling question of law [that] . . . may materially advance the ultimate termination of the litigation." *Digital*, 511 U.S. at 883 (quoting § 1292(b)).

occurrence of a condition—the passage of a fixed period of time. *See, e.g.*, 28 U.S.C. § 2401(a) (civil "action" against United States "barred" unless filed within six years of accrual); *id.* § 2401(b) (tort claim against United States "barred" unless presented to agency within two years of accrual); *see also, e.g.*, *Mayle v. Felix*, 125 S. Ct. 2562, 2572 (2005) (referring to "statute of limitations bar"); *Gonzalez v. Crosby*, 125 S. Ct. 2641, 2648 n.4 (2005) (same); *Franconia Assocs. v. United States*, 536 U.S. 129, 155 (2002) (describing limitations period in Tucker Act as a "bar"). Yet the Court has made clear that denial of a statute-of-limitations defense does not satisfy *Cohen*. *See Digital*, 511 U.S. at 873. If the judgment bar were characterized as an immunity conferring a "right not to stand trial," as Petitioners suggest (at 20-21), that well-established conclusion would have to be reconsidered; and the collateral order doctrine would quickly become unmoored from the narrow category of important and well-established immunities it currently encompasses.

The fact that section 2676 is a statutory provision rather than a common-law doctrine does not alter the outcome here. As Petitioners note (at 16), *Digital* distinguishes between rights that are "embodied in a constitutional or statutory provision," on the one hand, and rights conferred solely by private agreement, on the other. 511 U.S. at 879. *Digital* does not hold, however, that because a right is embodied in a statute, it is appropriate to characterize that right as an immunity or a right not to stand trial. Rather, addressing *Cohen*'s requirement that collateral order appeals be limited to "important" issues, *Digital* explained that *if* a statute confers an immunity, "there is little room for the judiciary to gainsay the 'importance'" of that policy. *Id.* at 879. Thus, if Petitioners could show that the statute conferred an immunity, the burden of demonstrating importance would be minimal. But they must first demonstrate that the statute confers that "rare form of protection." *Id.*

Notably, neither Congress nor the Court has ever characterized the judgment bar as an "immunity," let alone the sort of important immunity from suit necessary to invoke the collateral order doctrine. In contrast, Congress, in findings incorporated into its 1988 amendment to the FTCA, has expressly described the section 2679(b) exclusive remedy provision, which (with two exceptions) precludes suits against employees for torts committed in the scope of their employment, as providing an "immunity" for federal employees. *See* Westfall Act, Pub. L. No. 100-694, § 2(b) ("Findings"). Likewise, this Court has characterized section 2679(b) as an "immunity" provision. *See Gutierrez de Martinez*, 515 U.S. at 426. Petitioners' citations (at 24) to circuit court cases holding that denials of "Westfall Act immunity" are immediately appealable are, accordingly, inapposite.

Petitioners cite *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982), for the proposition that "'[a]mong the most persuasive reasons supporting official immunity' is the fact that 'to submit [government] officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." Pet. 16 (alterations in original); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citing similar interests to support immediate appeal of trial court order rejecting qualified immunity defense). That quotation may well be pertinent to the section 2679(b) exclusive remedy provision, in both effect and purpose, because that provision precludes most damages suits against federal employees. The quotation does not, however, apply to the judgment bar, which provides employees no protection unless a prior FTCA action has reached judgment. And although Petitioners are correct that the FTCA was intended, in part, to shift the burden of litigation from federal employees to the Government, that objective was met initially through the waiver

of sovereign immunity accomplished through section 1346(b) and, years later and to a greater extent, through the exclusive remedy provision (section 2679(b)), but not through the judgment bar. In fact, from 1946 until 1988, when Congress enacted the exclusive remedy provision, federal employees remained amenable to suit. *See Westfall*, 484 U.S. at 296-97. Petitioners may counter that section 2676 "immunity" does not attach until the plaintiff obtains a judgment in an FTCA case. That argument, however, does not describe the workings of an immunity, as that term has previously been understood; it describes the workings of res judicata.

Petitioners invoke *Abney v. United States*, which held that double jeopardy claims are immediately appealable. 431 U.S. 651, 662 (1977). *Abney*, however, does not support the right to an immediate appeal here. That decision "is based on the special considerations permeating claims of" double jeopardy]. *Id.* at 663. The purpose of the Double Jeopardy Clause, one "that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a state of anxiety and insecurity, as well as enhancing the possibility that even the innocent may be found guilty." *Id.* at 661-62 (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). Section 2676, by contrast, is not tied to any such historical interest.

To be sure, double jeopardy and section 2676 are similar in that—unlike immunities, which preclude suit in the first instance—both apply only after the termination of a prior court proceeding. And like section 2676, the Double Jeopardy Clause serves, in part, the same sort of interests as the doctrines of res judicata and collateral estoppel. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978). These similarities, however, also show that

the collateral order doctrine does not apply. As *Abney* explained, these sorts of preclusion principles—unlike the interests in protecting an individual from facing the "ordeal" of a criminal trial—"can be fully vindicated on appeal following final judgment." *Abney*, 431 U.S. at 660 (discussing interests in protecting individual against being twice convicted or twice punished for same crime). Accordingly, *Abney* confirms that res judicata interests, such as those at issue here, do not afford the basis for an immediate appeal.

Finally, Petitioners' argument in favor of immediate appellate review runs counter to the holding in *Swint*. There, a city and various county officials were sued under 42 U.S.C. § 1983, for damages arising from a series of raids on the plaintiffs' nightclub. The city moved to dismiss, arguing that, under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), it could not be held liable on a respondeat superior theory under section 1983. *Swint*, 514 U.S. at 39. The district court denied the motion, and the city appealed. Notwithstanding the holding in *Monell*—"a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents," 436 U.S. at 694—the Court rejected the characterization that *Monell* set forth an "immunity from suit," and therefore rejected the argument for appellate jurisdiction under *Cohen*. The Court explained that the city's argument was a "mere defense to liability" that could be effectively reviewed on appeal from final judgment, 514 U.S. at 43, and reiterated the principle that not every right that might be described as a "right not to stand trial" in fact qualifies as such. *Id.*

As in *Swint*, Petitioners' plea to transform their alleged defense into an immunity should be rejected. The Court should vacate the decision below on the ground that the court of appeals lacked subject matter jurisdiction under 28 U.S.C. § 1291.

III. The Dismissal Of A Case On The Ground That The Court Lacks Subject Matter Jurisdiction Because The FTCA Does Not Apply To The Claim Alleged Does Not Bar A Subsequent *Bivens* Claim.

If the Court affirms the Second Circuit's jurisdictional ruling, it should also affirm as to the scope of the FTCA's judgment bar. Section 2676 bars a plaintiff from bringing a claim against a federal employee only where that plaintiff has obtained a "judgment" in "an action under section 1346(b)." This provision does not bar the instant case for two related reasons. First, the decision in Hallock's first case did not resolve the merits of the underlying tort claim, but was based on the lack of subject matter jurisdiction. Thus, its only res judicata effect is on the issue of subject matter jurisdiction. Because the judgment bar is best construed in accordance with res judicata principles, the bar does not apply here. Second, the prior case was dismissed because section 1346(b) did not apply to Hallock's claims. For this reason, the case was not "an action under section 1346(b)."

A. The Term "Judgment" In Section 2676 Means A Decision On The Substantive Merits Of The Tort Claim.

The FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres*, 340 U.S. at 139. Reading the judgment bar to embody traditional principles of res judicata, and thus reading "judgment" in section 2676 to include only substantive decisions on the merits of FTCA claims, is consistent with the structure and purpose of the FTCA as a whole and avoids the inequitable consequences of broader interpretations of the term.

1. Looking to one meaning of the term "judgment," Petitioners advocate a broad reading of section 2676 under which any final order in any case alleged to fall under the FTCA bars a subsequent action against the employee involved in the underlying act. The term "judgment," however, has many definitions, and its meaning varies with context.

For example, Federal Rule of Civil Procedure 54(a) defines "judgment" to mean "a decree and any order from which an appeal lies." Although the reading advocated by Petitioners is consistent with Rule 54's definition, Rule 54(a) specifies that its definition applies only "as used in these rules." Moreover, even the Rule 54 definition plainly does not include every judgment under the Federal Rules, such as a partial summary "judgment" under Rule 56 or a declaratory "judgment" in a case in which the plaintiff also seeks an injunction, the form of which has not yet been approved by the court. *See also Catlin*, 324 U.S. at 231, 236 (district court judgment of condemnation not immediately appealable where case not disposed of in its entirety).

In contrast, as used in Federal Rule of Civil Procedure 68, "judgment" means "either the substantive relief ordered (whether legal or equitable), or that plus attorneys' fees." *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553 (8th Cir. 2001); *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999). Accordingly, when comparing a Rule 68 "offer of judgment" to the "judgment finally obtained" in the case, courts have noted the ambiguity of the term "judgment" in the context of Rule 68. *See Hennessy*, 270 F.3d at 553; *Nordby*, 199 F.3d at 392; *see also Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141-42 (9th Cir. 2001) (recognizing ambiguous meaning of "judgment" in Immigration and Naturalization Act).

Federal Rule of Civil Procedure 58 requires that "[e]very judgment . . . must be set forth on a separate document." That separate document is commonly referred to as the "judgment." *See* Fed. R. Civ. P., Form 32. This use of "judgment" is much narrower than the definition in Rule 54, which includes various collateral orders and orders with respect to injunctions, *see* 28 U.S.C. § 1292(a)(1), that do not end the litigation. *See* Rule 54(a) ("any order from which an appeal lies"). In addition, in discussing what constitutes a judgment in the context of a prior version of Rule 58, this Court equated "judgment" with a court's "final act" in a case. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-35 (1958). Under that definition, a ruling on the merits would not constitute a "judgment" if additional matters were still pending—for example, entitlement to attorney fees where the court has granted summary judgment on the merits of the cause of action. *Cf. White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445, 452 (1982) (reversing court of appeals' holding that motion for attorney fees constitutes motion to alter or amend judgment); Rule 54(d)(2) (motion for attorney fees must be filed no later than 14 days "after entry of judgment").

Further demonstrating that "judgment" has no unitary meaning, in 2002, the Advisory Committee revising the Federal Rules of Civil Procedure noted the "horridly confused problems" that resulted from courts' varied understandings of what constitutes a "judgment" for purposes of determining whether Rule 58's separate document requirement has been satisfied. *See* Fed. R. Civ. P. 58 advisory committee's note (2002).

Thus, "judgment" may mean, among other things, the final decision in a case (the meaning suggested by Petitioners), or the substantive relief ordered, or a decision on the merits of a claim, or an appealable order, or a formal document ending a case. *See also Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990)

(under Social Security Act, district court remand order pursuant to fourth sentence of 42 U.S.C. § 405(g) is "judgment," but remand order under sixth sentence is not). Because the meaning depends on context, one must look to the structure and purpose of the FTCA to guide construction of the term "judgment" in section 2676. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991) ("[A] statute is to be read as whole, since the meaning of statutory language, plain or not, depends on context.") (citation omitted); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) ("[S]tatutory language must always be read in its proper context."); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

2. Under the "normal rule of statutory construction," "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). "That principle follows from [the Court's] duty to construe statutes, not isolated provisions." *Id.* at 568.

In the FTCA, the word "judgment" appears several times. Putting aside its use in section 2676, in each instance in which the term appears in the FTCA, it clearly refers to a money judgment for the plaintiff. *See* 28 U.S.C. § 2672 (any award or settlement to be paid in a manner similar to "judgments" and compromises in like causes, and funds available for payment of such "judgments" and compromises to be made available for payment of FTCA awards and settlements); § 2674 (United States not liable for interest prior

to judgment); § 2678 (attorney fees not to exceed 25% of judgment rendered pursuant to § 1346(b)). This consistent use of the term indicates that the judgment bar of section 2676 refers to a judgment on the substantive merits of the underlying tort claim, of which a money judgment for the plaintiff is one type.

Likewise, section 2672, addressing the administrative settlement of claims, requires a far narrower reading of section 2676 than Petitioners advocate here. Again, section 2672 provides that acceptance of an administrative settlement constitutes "a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." This language in many ways mirrors the language of the judgment bar. *See supra* p. 2. Furthermore, during the hearings on the bill later enacted as the FTCA, the only example provided of the operation of the judgment bar bundled together sections 2672 and 2676, and explained that these provisions would come into play where "the claimant has *obtained satisfaction of his claim* from the Government, either by a judgment or by an administrative award." Hearings, *supra*, at 9 (emphasis added). The "complete release" of section 2672 applies only in instances where the claimant has accepted a settlement at the administrative stage, thereby substantively resolving the matter. In light of the parallelism—of both language and purpose—between section 2672 and section 2676, and the unitary treatment of the two sections in the legislative history, it is evident that the judgment bar, too, was aimed at cases in which the plaintiff has obtained a judgment that resolves the substantive merits of the claim.

The understanding that the judgment bar and the administrative settlement provision serve similar purposes and that the judgment bar applies only where the substantive merits of the underlying tort claim have been resolved is reflected in

this Court's earliest statement with respect to the bar. In *United States v. Gilman*, 347 U.S. 507 (1954), the Court explained:

> The Tort Claims Act does not touch the liability of the employees except in one respect: by 28 U.S.C. § 2676, it makes the *judgment against the United States* "a complete bar" to any action by the claimant against the employee. And see § 2672.

Id. at 509 (emphasis added); *see also Benbow v. Wolf*, 217 F.2d 203, 205 n.4 (9th Cir. 1954) ("The Congress has the apparent intention that the individual be not pursued if the United States be liable."). Early commentators construed the judgment bar similarly. *See* Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy*, 63 Yale L.J. 570, 575 n.30 (1954) ("palpably unfair" to construe judgment bar to apply to all judgments, such as "where judgment is rendered for the Government on the grounds that the employee acted outside the scope of his employment"); Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167, 176 (1952) (judgment bar "obviously" does not apply where first action was dismissed because the employee had not acted within the scope of his employment); *see also* Street, *supra*, 47 Mich. L. Rev. at 358; Note, *supra*, 56 Yale L.J. at 559.

The purposes of the FTCA in general and the judgment bar in particular also support reading the term "judgment" to mean a decision on the merits. "The basic purpose of the legislation is to waive a part of the governmental immunity to suit in tort" so as to provide a remedy for people injured by the tortious conduct of government employees acting in the scope of their employment. H.R. Rep. No. 79-1287 at 1, 2 (1945); *see* Hearings, *supra*, at 25 (right to sue employee not sufficient because employee often "not financially capable of meeting a sizable judgment" and because "Government should in all

conscience bear the responsibility" for such torts). The drafters were also concerned about avoiding duplicative recoveries and easing the burden on the Government of defending duplicative lawsuits, given the Government's practice of defending suits brought against employees for conduct within the scope of their employment. *See* Hearings, *supra*, at 9 ("If the Government has satisfied a claim . . . that should, in our judgment, be the end of it. . . . [The claimant] should not be able to turn around and sue the [government employee]."); *id.* at 24-26; *see also* Baer, *Suing Uncle Sam in Tort: A Review of the Federal Tort Claims Act and Reported Decisions to Date*, 26 N.C. L. Rev. 119, 126 (1948) ("Such a provision is, of course, in accord with the common law rule that a claimant can have but one satisfaction for one wrong. Presumably, the claimant will have been made whole by virtue of the judgment he obtained against the government and hence should have no claim against the employee.") (footnote omitted). These objectives were achieved, in part, through section 2676, by extending the res judicata effect of a judgment on an FTCA claim to federal employees. *See* discussion *supra* pp. 13-16. Given the confluence of language and goals between the judgment bar provision and the res judicata doctrine, the best reading of "judgment" in section 2676 is "judgment on the substantive merits of the tort claim."

3. Not only does a dismissal based on a section 2680 exception not "actually 'pass[] directly on the substance of [the tort] claim before the court,'" but such a dismissal is for lack of subject matter jurisdiction—the classic example of a decision that is *not* on the merits and to which res judicata does *not* apply. *Semtek Int'l Corp. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001) (quoting Restatement (Second) of Judgments § 19 cmt.a); *see also* Fed. R. Civ. P. 41(b) (dismissal for lack of jurisdiction not an adjudication on merits). In this

situation, section 2676 does not bar an action against the employee.

Petitioners argue that the distinction between dismissals for lack of subject matter jurisdiction and dismissals on the merits is blurred in a case dismissed on the ground that the claim falls within a section 2680 exception. According to Petitioners, the section 2680 exceptions are "substantive," and thus a dismissal based on section 2680 has a substantive quality. But the key inquiry is not whether the exceptions have "substantive" content, but their role in the FTCA. The very first line of section 2680 makes their role clear: "The provisions of this chapter and section 1346(b) shall not apply to—." That is, the exceptions' function is to limit the scope of the jurisdictional provision, section 1346(b). *See* Hearings, *supra*, at 28 (describing § 2680 claims as "exemptions" and "exceptions" from the bill, in contrast to torts "within the scope of the bill"). As this Court has repeatedly explained: "Sovereign immunity is jurisdictional in nature. . . . [T]he 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *FDIC v. Meyer*, 510 U.S. at 475 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see also United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

More generally, Petitioners' concern that the structure of the FTCA results in a great many dismissals for lack of subject matter jurisdiction, which restricts the effect of the judgment bar, is overstated. In most cases, regardless of the scope of the judgment bar, the employee will be protected by the exclusive remedy provision, section 2679(b). In any event, Petitioners' concern is a matter to be taken up with Congress, not this Court. Congress chose to limit the waiver of sovereign immunity embodied in section 1346(b) through both the

elements of that provision and through the list of claims to which the waiver "shall not apply." It cannot be disputed that such claims, including those in Hallock's first case, are not within the power of a court to adjudicate. The United States has not consented to be sued for such claims, and sovereign immunity still attaches. *See Gutierrez de Martinez*, 515 U.S. at 427 (where case involves exception to FTCA, "the United States retains immunity from suit"). Therefore, the courts lack jurisdiction over those claims. A dismissal on that basis does not touch the merits of the tort claim under state law, has no res judicata effect (again, aside from the question of jurisdiction), and does not trigger the judgment bar.

Petitioners (at 42 n.9) contend that a dismissal for failure to satisfy the substantive elements of a state-law cause of action would surely trigger the judgment bar, and yet dismissal on that ground could be considered a dismissal for lack of jurisdiction under section 1346(b) because that section provides for federal court jurisdiction in circumstances where, among other things, a private person "would be liable to the claimant in accordance with the law of the state where the [tortious] act or omission occurred." Many statutes, however, frame jurisdiction in terms of the violation alleged or remedy available. Accepting Petitioners' construct would transform dismissals based on failure to prove the substantive elements of a claim under a broad range of statutes into dismissals for lack of subject-matter jurisdiction. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B) (under Freedom of Information Act, district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld"); 21 U.S.C. § 332 (providing for "jurisdiction, for cause shown to restrain violations of" Food, Drug, and Cosmetic Act); 30 U.S.C. § 818(b) ("[T]he court shall have jurisdiction [under Federal Mine Safety and Health Act] to provide such relief as may be appropriate.").

That a jurisdictional provision is stated with reference to a particular violation does not render proof of that violation necessary for subject-matter jurisdiction. For example, in a case brought against a federal agency under the Freedom of Information Act, the plaintiff's failure to prove that the agency improperly withheld the particular records at issue does not produce a failure of subject-matter jurisdiction, in the sense that the term is properly used. As the Court has explained, the term "jurisdictional" should be reserved to describe "classes of cases" that a court has authority to adjudicate. *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). Section 2680, which lists categories, or "classes," of cases excluded from the waiver of sovereign immunity, fits this description to a T. By contrast, a court handling a case to which section 1346(b) applies plainly has the authority to adjudicate whether a federal agency is liable under state-law principles, and its decision that the agency is not liable does not mean that it never had authority to decide the case. Rather, it has exercised that authority and decided the merits.

Moreover, Petitioners' discussion of the consequence of a dismissal based on lack of liability under state law fails to address the key inquiry: the preclusive effect of the decision in the case. A judgment based on a determination that the plaintiff was *not* the victim of a state-law tort is a determination on the merits, just as surely as a decision that the plaintiff *was* the victim of a tort. And a judgment based on a determination with respect to liability under state law is precisely the type of judgment that carries full res judicata effect because the determination does not address *whether* the court has the power to adjudicate the case, but in fact *is* an adjudication on the merits of the case. Indeed, whether or not denoted a decision on "jurisdiction," a dismissal on state-law grounds would have

the same preclusive effect on the plaintiff because the issue *actually decided* would be that the plaintiff has no tort claim.[8]

In contrast, a determination based on a section 2680 exemption does not touch on the merits question in the case: whether the government employees committed a tort under the applicable state law. It is a decision with respect to jurisdiction: whether the case falls within the class of cases for which Congress waived sovereign immunity. The decision has no res judicata effect (other than on the issue of jurisdiction). Therefore, it does not trigger the judgment bar.

4. Petitioners (at 42) assert that the FTCA's limitations period circumscribes the waiver of sovereign immunity and that a dismissal on statute of limitations grounds is a dismissal for lack of jurisdiction. They then assume that a judgment based on expiration of the statute of limitations triggers the judgment bar and conclude that a judgment based on section 2680 must do so as well. Petitioners' reasoning and conclusion are flawed.

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[8]Petitioners (at 41) quote from a footnote in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which cites *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997), for the point that "a 'jurisdictional' limitation [that] adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply" is "essentially substantive." However, *Hughes* discussed the substantive nature of the rights created by the "jurisdictional statute" only to explain why the presumption against retroactivity applied, and the opinion nowhere implies that the dismissal for subject matter jurisdiction in that case had different res judicata consequences from a dismissal on that ground in other cases.

In *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979), the Court referred to the statute of limitations provision in the FTCA as "a condition of [the] waiver" of sovereign immunity. From this statement, some courts have concluded—and Petitioners assume—that compliance with the FTCA's statute of limitations is jurisdictional and that dismissal on that ground is a dismissal for lack of subject matter jurisdiction. *See Johnson v. Smithsonian Inst.*, 189 F.3d 180 (2d Cir. 1999). However, the FTCA's statute of limitations is not included in the jurisdictional provision, section 1346(b), or even in chapter 171 of Title 28, to which section 1346(b) is "subject." *See* 28 U.S.C. § 2401(b) (provision of Ch. 161 setting forth statute of limitations for tort claims against the United States). Furthermore, the Court has expressly warned against "[c]lassifying time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'" *Scarborough*, 541 U.S. at 414 (citation omitted); *see also id.* (term "jurisdictional" is properly reserved to describe "classes of cases" over which a court has authority); *cf. Zipes v. Trans World Airlines*, 455 U.S. 385, 393, 394, 395 (1982) (timely filing of administrative claim is not "jurisdictional" prerequisite to Title VII suit, where filing deadline is comparable to statute of limitations). Accordingly, a statute-of-limitations defense to an FTCA claim is not properly deemed "jurisdictional." In contrast, section 2680, listing exceptions to section 1346(b), indisputably lists categories of cases that fall outside the courts' adjudicatory authority and, therefore, sets forth jurisdictional limits.

Terminology aside, for res judicata purposes, "the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the right, so that dismissal on that ground does not have [res judicata] effect in other jurisdictions with longer, unexpired limitations periods." *Semtek*, 531 U.S. at 504; *accord* 18A Wright, Miller & Cooper, *supra*, § 4441, at 214 n.1 (citing

cases). In this way, a dismissal on statute-of-limitations grounds has a similar effect for res judicata purposes as a dismissal for lack of subject matter jurisdiction.[9]

Moreover, the Court has made clear that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Franconia Assocs.*, 536 U.S. at 145 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). For example, in *Irwin*, although the Court recognized that the statute of limitations was an aspect of the waiver of sovereign immunity, it applied the same estoppel principles to a case against the United States as would apply in a case against a private party. 498 U.S. at 95. Thus, in an FTCA suit, a statute-of-limitations dismissal extinguishes the FTCA remedy. However, it does not address the underlying merits of the state-law tort claim and has no preclusive effect beyond the limitations issue. In line with

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[9]As the Court has observed, "the meaning of the term 'judgment on the merits' 'has gradually undergone change,' and it has come to be applied to some judgments . . . that do *not* pass upon the substantive merits of a claim and hence do *not* (in many jurisdictions) entail claim preclusive effect." *Semtek*, 531 U.S. at 502 (citation omitted). One example of this expanded use of "judgment on the merits" is use of the phrase to describe a dismissal on statute-of-limitations grounds. *Id.* at 502-03 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995)). Thus, notwithstanding the "possibly misleading connotations," *id.* at 503 (citing Restatement (Second) of Judgments § 19 cmt. a, at 161), references in some cases to statutes-of-limitations dismissals as "judgments on the merits" should not be taken to mean that such dismissals have a res judicata effect beyond the statute-of-limitations question. *See id.* at 504.

the res judicata principles that underlie the judgment bar, section 2676 should not apply to dismissals on statute-of-limitations grounds, just as it does not apply to dismissals based on section 2680.

5. Congress's decision to limit the waiver of sovereign immunity by framing much of the FTCA in terms of jurisdiction is consistent with the purposes of the FTCA and the judgment bar. Congress's objective was not to deprive injured individuals of all means of recovery. Congress wanted to prevent double recoveries, to shift the burden from employees to the United States in certain circumstances, and to avoid duplicative litigation. *See supra* pp. 13-15, 31-32. Hallock's reading of the judgment bar is consistent with those objectives. Petitioners' reading, however, would transform the judgment bar from a tool for fairness and efficiency into a punitive provision to trap unsophisticated plaintiffs or those who—at the start of litigation, before discovery—have a good faith (but incorrect) belief that a federal employee was acting within the scope of employment or that a claim does not fall within an exception to the waiver of sovereign immunity.

For example, suppose that a government employee is involved in a car accident and the driver of the other vehicle, believing the employee to have been on government business at the time of the accident, files suit against the Government alleging an FTCA claim. The Government then successfully moves to dismiss for lack of subject matter jurisdiction because the driver, although a government employee, was not acting within the scope of his employment, but was on a personal errand at the time of the accident. Under Petitioners' theory, the plaintiff would be barred by the "judgment" in the first case from then bringing a tort action against the employee. Such an outcome would not serve the FTCA's goals. *See Gutierrez de Martinez*, 515 U.S. at 426 (Congress "wanted the employee's personal immunity to turn on that [scope-of-employment]

question alone") (citing legislative history of Westfall Act). Rather, that result would undermine the drafters' objective of providing a more certain avenue for "giving claimants a day in court in respect of common-law torts committed by Government employees in the scope of their employment." *See* Hearings, *supra*, at 24.[10]

Or suppose a plaintiff sues a federal employee for a state-law tort, and the Government substitutes in as defendant pursuant to section 2679(d)(1). Because the plaintiff has not previously filed an administrative claim, the case is dismissed for failure to exhaust administrative remedies. That dismissal would not have a res judicata effect as to any issue other than exhaustion at that time, 18A Wright, Miller & Cooper, *supra*, § 4436, at 172; and assuming that the FTCA's statute of limitations had not expired before the case against the employee was filed, the dismissal would not bar the plaintiff from filing an administrative claim against the Government and then suing again if the claim were not resolved. 28 U.S.C. § 2679(d)(5). Yet under Petitioners' reading, that judgment would bar a *Bivens* action against the employee. *Cf. Freeze v. United States*, 343 F. Supp. 2d 477 (M.D.N.C. 2004) (plaintiff alleged FTCA claim against Government and, in same complaint, alleged *Bivens* claim against federal employee; court

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[10]Although a plaintiff must first file an administrative claim with the Government, doing so will not necessarily tell him whether the Government believes that the claim falls outside the scope of the FTCA. As happened in Hallock's case, the Government does not always respond to an administrative FTCA claim within six months. If the claim is not resolved within six months, the plaintiff may consider the claim denied and file suit. 28 U.S.C. § 2675(a); *see, e.g, Gutierrez de Martinez*, 515 U.S. at 421 n.1.

dismissed FTCA claim for failure to exhaust and then dismissed *Bivens* claim on basis of judgment bar). This outcome, too, is inconsistent with the structure and purpose of the FTCA as a whole, as well as with the legislative intent behind the judgment bar.

B. The Prior Action Was Not "Under Section 1346(b)."

The FTCA's judgment bar, section 2676, applies only after a judgment has been issued in "an action under section 1346(b)." The bar does not extend to an action "alleged to fall under" section 1346(b) or to an action in which the plaintiff "tried to invoke jurisdiction under" section 1346(b). Hallock's first suit was dismissed precisely because it was not an action under section 1346(b). The judgment in that case therefore could not trigger section 2676. For this reason as well, if the Court concludes that the court of appeals had jurisdiction, its decision should be affirmed.

1. To be sure, the complaint in Hallock's first case alleged section 1346(b) as the basis for jurisdiction. However, in holding that the claims alleged fell outside of section 1346(b), the district court rejected Hallock's jurisdictional allegation. Specifically, because the claims alleged arose "in respect of . . . the detention of goods," they fell under an exception to the waiver of sovereign immunity stated in section 2680(c), and so, by definition, section 1346(b) did "not apply" to them. 28 U.S.C. § 2680.

As the Court has explained: "[Section] 1346(b) describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable." *FDIC v. Meyer*, 510 U.S. at 479. Without dispute, the United States has not waived its immunity and rendered itself liable for claims arising from the detention of goods. 28 U.S.C. § 2680(c); *see Kosak v. United States*, 465

U.S. 848 (1984). Indeed, that conclusion was the basis for the holding in Hallock's first case. Thus, to accept the argument that the judgment bar applies here requires one to accept the contradiction that a claim can simultaneously be a claim to which section 1346(b) "shall not apply" and a claim "under" section 1346(b). But an action *outside* the scope of section 1346(b) cannot also fall *under* section 1346(b).

Petitioners' counsel seek to have it both ways. On the one hand, they successfully argued in the first case that the jurisdictional allegation in Hallock's complaint was incorrect and that the action could not be maintained under section 1346(b). On the other hand, they argue here that the jurisdictional allegation must be respected and accepted on its face to show that the first case was an action under section 1346(b). But the legal allegation of section 1346(b) jurisdiction has already been adjudicated, and the Government won: The court held that section 1346(b) did "not apply" to Hallock's claims. Nothing in the language of the judgment bar or the structure or purposes of the FTCA requires the Court to look with tunnel vision at the first complaint's jurisdictional allegation and treat it as correct, when the matter has already been litigated to a final and contrary conclusion. *See Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934) (allegation in complaint that case fell under Judicial Code § 266 insufficient to allow plaintiff to avail itself of appeal provisions of that section, where § 266 did not in fact apply); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (complaint alleged under state law "is in reality based on federal law" when a federal statute completely preempts the state-law cause of action).

2. In *FDIC v. Meyer*, the Court considered the scope of the FTCA provision stating that, for those agencies with authority to sue and be sued in their own names, the FTCA is nonetheless the exclusive remedy for claims "cognizable under

section 1346(b)." 28 U.S.C. § 2679(a). Looking to the language of section 1346(b), the Court identified six elements of a claim "cognizable" or "actionable" under that section. 510 U.S. at 477. Here, Petitioners argue that Hallock's first case was "under section 1346(b)" because each of the six elements identified in *Meyer* was satisfied in the prior case. However, in *Meyer*, the claim at issue did *not* satisfy each of the elements. Consequently, the Court had no occasion to consider whether a claim "cognizable under" section 1346(b) must meet any additional requirements. In particular, the Court did not discuss the exceptions to section 1346(b) listed in section 2680.

Nonetheless, as Petitioners point out, several courts have construed section 2679(a) to preclude suits against an agency, even if a claim falls within a section 2680 exception and therefore cannot be maintained under the FTCA. *See, e.g., Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1142 (10th Cir. 1999). However, each of these decisions has relied on the Court's statement that Congress, through section 2679(a), limited the scope of sue-and-be-sued waivers so as to "place tort suits of 'suable' agencies . . . upon precisely the same footing as torts of 'nonsuable' agencies." *FDIC v. Meyer*, 510 U.S. at 476 (alteration in original) (quoting *Loeffler v. Frank*, 486 U.S. 549, 562 (1988) (quoting H.R. Rep. No. 79-1287 at 6 (1945))). "Sue-and-be-sued" agencies cannot be "on the same footing" as other agencies if tort suits against them are not precluded where the matter falls under a section 2680 exception. Thus, the purpose of section 2679(a) strongly favors the broad reading adopted in the cases on which Petitioners rely.

In contrast, the purpose of section 2676 does not favor a broad reading. In section 2676, construing the phrase "under section 1346(b)" to include only suits to which section 1346(b) in fact "applies"—that is, not to encompass suits that fall within

an exception—does not undermine the purpose of the judgment bar. As the district court observed, in circumstances where an FTCA claim has been promptly dismissed for lack of subject matter jurisdiction (as in Hallock's prior case or in cases where a *Bivens* claim is alleged along with an FTCA claim), reading the judgment bar to require dismissal of a *Bivens* claim neither prevents duplicative litigation nor is necessary to prevent dual recovery. Pet. App. 24a.

The different language used in section 2676—"under" as opposed to "cognizable under"—further supports the conclusion that the judgment bar does not apply where a prior case was dismissed because the claim fell within an exception to section 1346(b). As this Court has noted, "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (construing phrase "under section 554" in Equal Access to Justice Act). As used in section 2676, the natural reading is that "under" means "subject to" or "governed by." *See id.* A suit dismissed because the claims fall within an exception to section 1346(a) cannot logically be said to be "subject to" or "governed by" that section.

3. The notion that a claim is governed by a statutory provision that does not apply to it requires linguistic gymnastics beyond the flexibility of the English language. Petitioners argue, however, that *United States v. Smith*, 499 U.S. 160 (1991), requires the Court to undertake such gymnastics. In that case, the Court construed section 2679(b)(1), which states:

> The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope

> of his or her employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . . Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee . . . is precluded without regard to when the act or omission occurred.

The Court held that this provision applies even where the claim falls under one of the exceptions stated in section 2680. As a result, "the FTCA is the exclusive mode of recovery for the [common-law] tort of a government employee even when the FTCA itself precludes government liability." 499 U.S. at 166.

According to Petitioners (at 33-34), because the Court concluded that the phrase "the remedy . . . provided by sections 1346(b) and 2672" includes instances where the claim is precluded by section 2680, the phrase "an action under section 1346(b)" in the judgment bar includes cases improperly brought under section 1346(b) and dismissed under section 2680. This argument ignores entirely the language of the different provisions and the Court's reasoning in *Smith*. To begin with, the language of section 2679(b)(1) does not parallel the language of the judgment bar. The exclusive remedy provision provides that, subject to the two express exceptions set forth in 28 U.S.C. § 2679(b)(2), the remedy provided by sections 1346(b) and 2672 is "exclusive" for the torts described, and that "[a]ny other civil action . . . for money damages arising out of or relating to the same subject matter . . . is precluded." This broad language does not say that the remedy is exclusive for claims "under section 1346(b)." It says that, for the torts described, section 1346(b) provides the only avenue for a judicial remedy. Accordingly, as *Smith* held, whether or not that avenue is closed (as when the tort arises from an act within

a section 2680 exception), section 2679(b)(1) forecloses an action against the employee.

Moreover, Petitioners' leap—that if section 2679(b)(1) applies regardless of whether a plaintiff's claim falls under an FTCA exception, then section 2676 applies regardless of whether the prior case was dismissed because it fell under an exception—is not supported by the Court's reasoning in *Smith*.

Smith was based on two provisions of the FTCA. First, *Smith* looked to section 2679(d). That provision, enacted in 1988 as part of the Westfall Act, directs the Attorney General, when a federal employee is sued in tort, to certify that the employee was acting within the scope of his or her employment, where that is the case. Once the Government has done so, the suit proceeds as an FTCA action against the United States, "subject to the limitations and exceptions applicable to those actions." 28 U.S.C. § 2679(d)(4). This language, *Smith* explained, shows that Congress intended to require substitution of the United States even in cases where doing so would foreclose a remedy altogether because the claim against the Government would fall under a section 2680 exception. *Smith*, 499 U.S. at 166. The Court noted that the legislative history fully supports such a reading. *Id.* at 167 n.9 ("Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 . . . also is precluded against an employee in his or her estate.") (emphasis omitted) quoting legislative history). Neither section 2679(d) nor the 1988 legislative history of the exclusive remedy provision sheds any light on Congress's intent in 1946 with respect to the judgment bar.

Second, *Smith* looked to section 2679(b)(2), which provides that 2679(b)(1) does not apply to *Bivens* actions and actions under federal statutes that authorize recovery against a government employee. Because Congress created two express exceptions to the exclusive remedy provision, the Court

declined to imply a third (for claims falling within section 2680), absent evidence of a contrary congressional intent. *Smith*, 499 U.S. at 167. Again, this portion of the Court's reasoning, which focuses on other provisions of section 2679 and the legislative intent of the 1988 Westfall Act, says nothing about the proper construction of the judgment bar, which has remained unchanged since its enactment in 1946. To the extent that *Smith* helps at all to discern the scope of the bar, it supports Hallock's position by pointing to Congress's effort to preserve *Bivens* actions from the risk of preclusion by broad readings of the FTCA, such as the reading that Petitioners advocate here.

4. That Petitioners seek to bar a *Bivens* claim also supports Hallock's reading. *Bivens* held that a victim of a constitutional violation by a federal officer may bring a damages action against the officer in federal court. 403 U.S. at 397. The Court later explained that individuals who have "no [other] effective means" of redress "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 U.S. 228, 242 (1979). Hallock's first case established that Hallock had "no effective means" of redress other than *Bivens*—indeed, no means at all—because the only other potential avenue, an FTCA cause of action, does "not apply" to the facts at issue. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (explaining that *Bivens* claims are recognized where plaintiff "lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct"). Hallock's circumstances are precisely those for which a *Bivens* claim should be available.

The Congress that passed section 2676 in 1946 did not speak to its effect on a *Bivens* claim (a cause of action not expressly recognized by the Court until 1971). Nonetheless, statements from later years show that Congress, in amending the FTCA, has assumed that the statute does not have the harsh

impact advocated by Petitioners. For example, in 1974, Congress amended the FTCA to allow claims against the United States based on the commission of certain intentional torts by federal law enforcement officers. *See* 28 U.S.C. § 2680(h). The legislative history "made it crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980) (section 2680(h) "should be viewed as a *counterpart* to the *Bivens* case and its progeny") (quoting S. Rep. No. 93-588 at 3 (1973) (emphasis added in opinion)). The notion that an FTCA claim and a *Bivens* claim are "parallel" and "counterpart[s]" cannot be reconciled with the theory that a judgment based on a finding that the FTCA does "not apply" can preclude *Bivens* liability.

Likewise, the exclusive remedy provision enacted in 1988 broadly immunized federal employees from tort liability, *see* 28 U.S.C. § 2679(b)(1), but preserved liability for constitutional violations (that is, *Bivens* claims) and in instances where an action is expressly authorized by another statute. *See id.* 2679(b)(2). Section 2679(b) limits the significance of the judgment bar, which now has practical effect only in section 2679(b)(2) cases. At the same time, section 2679(b)(2) shows that Congress did not think that the policy (embodied in the exclusive remedy provision) of precluding liability against employees applied to claims outside the FTCA. The legislative history of the original statute—explaining that section 2676 "constitutes a bar to further action upon the same *claim*"—evinces the same policy judgment. *See* Hearings, *supra*, at 27 (emphasis added).

* * * * *

The purposes of the FTCA— providing a remedy for people injured by government employees, while at the same time precluding suit against employees where the matter has

been resolved with the Government—do not support barring an action that is based on a claim that is not among those for which Congress has shifted liability to the Government. In cases such as this one, Congress has left liability to rest on the individual employee. Petitioners maintain that, because Susan Hallock and Ferncliff Associates erroneously sued the United States, alleging a claim outside the scope of the FTCA, their *Bivens* claim is barred by the principles of res judicata embodied in section 2676. Neither 2676 nor any other authority compels that harsh result.

CONCLUSION

The decision of the court of appeals should be vacated because the court lacked appellate jurisdiction. If the Court finds that the court of appeals had appellate jurisdiction, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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